



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 3, 1998

Mr. Ryan Tredway
Staff Attorney
Legal and Compliance, MC 110-1A
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR98-0581

Dear Mr. Tredway:

You ask whether certain information is subject to required public disclosure under the Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 113701.

The Texas Department of Insurance (the "department") received a request for information concerning the purchase of the Texas Worker's Compensation Insurance Facility (the "Facility") by the Facility Insurance Corporation. You state the department is releasing to the requestor a copy of "Form A." *See* Ins. Code art. 21.49-1, § 5 (a). You assert that the requested information is excepted from required public disclosure based on sections 552.101, 552.106, 552.110, 552.111 and 552.112 of the Government Code. Some of the department's exceptions are waived if not timely raised. *See* Open Records Decision Nos. 630 (1994), 400 (1983). The department concedes that it did not submit its request for an open records decision within the statutory ten days. *See* Gov't Code § 552.301(a). The department argues that the time for requesting an open records decision was tolled for a period. We understand the department to be arguing that the tolling effectuated an extension of the statutory deadline, thereby making the department's request timely.

We begin with the threshold question of the tolling of the statutory deadline for submission of an open records request. You state that the department received the request for information on December 17, 1997. The tenth business day after the department received the request is January 6, 1998. This office received the department's request for an open records decision on this matter on January 9, 1998. You acknowledge that the department's request for a decision was made later than the ten business days required under the act. *See* Gov't Code § 552.301. You assert, however, that the ten-day deadline was tolled while the department attempted to clarify the scope of the request. You state that the department "contacted" the requestor on December 30, 1997, January 5, 6 and 7, 1998. You state that on January 6, 1998, the requestor indicated by telephone that he wished to narrow the scope

of his request. You state that later on that same day, the requestor stated that he did not wish to narrow his request. You go on to say that "[b]ecause [the department] was attempting to resolve the confusion regarding the scope of the request, the timeline for submitting this request for opinion was tolled." You provide no information about "contacts" with the requestor on the other dates you specified.

The requestor, in a sworn affidavit, states that on December 23, 1997, a representative of the department's Workers Compensation Division stated that his division had no responsive documents. The requestor also states that on January 6, 1998, a department representative asked him by telephone to amend his request to exclude privileged documents. The requestor states that on January 6, 1998, he informed the representative by telephone and by letter sent via facsimile that he would not amend his request. The requestor states that he "did not present to [the department] his desire and/or inclination to 'narrow' [his] request."

The act is silent concerning "tolling" of the ten-day deadline for submitting an open records request. However, the act permits a governmental body to "clarify a request" and to "discuss with the requestor how to" narrow the scope of a request:

If what information is requested is unclear to the governmental body, the governmental body may ask the requestor to clarify the request. If a large amount of information has been requested, the governmental body may discuss with the requestor how the scope of a request might be narrowed, but the governmental body may not inquire into the purpose for which information will be used.

Gov't Code § 552.222(b); *see* Open Records Decision No. 304 (1982) (governmental body may require requestor to identify particular kind of document sought). Thus, while the act permits a governmental body to ask a requestor to clarify and discuss narrowing the scope of a request, the act does not provide that during such clarification and discussion the time running on the deadline will be tolled.

This office has determined that the time for the ten-day deadline does not run while a governmental body attempts to informally resolve a request and there is legitimate confusion about the scope of a request. *See* Open Records Decision No. 333 (1982). Open Records Decision No. 333 (1982) found that because there was legitimate confusion on the part of the City of Houston about the scope of a request for police blotters and about whether the request could be resolved without requesting an open records decision on the matter, the operative request for information was the requestor's subsequent letter in which the request was clarified.

Here, the department has not stated that it did not understand the scope of the request as written. Nor are we informed that the department and the requestor believed the request could be resolved informally without requesting a decision. Rather, it appears that on the day the request for a decision was due, the department spoke with the requestor in an attempt to obtain his agreement to reduce the amount of information being requested. We do not

believe the department tolled the statutory deadline in this way. Furthermore, even if we were to find that the department's actions tolled the statute while discussing the reduction of the request, we believe the statute would be tolled only during the time when the department entered into discussion with the requestor on January 6th until the conclusion of that discussion when the requestor declined to reduce the scope of the request, also on January 6th. We have no information about the department's "contacts" on earlier dates that would suggest that the department and the requestor were involved in communications concerning the request. Thus, in any case, the time was running from December 17th, the date the department received the request, until January 6, 1998.

Thus, we conclude that the department failed to seek our decision within the ten-day period mandated by section 552.301(a). Because the department did not request an attorney general decision within the deadline provided by section 552.301(a), the requested information is presumed to be public information. Gov't Code § 552.302; *see Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ).

In order to overcome the presumption that the requested information is public information, a governmental body must provide compelling reasons why the information should not be disclosed. *Hancock*, 797 S.W.2d at 381. When an exception to disclosure that is designed to protect the interests of a third party is applicable, the presumption of openness may be overcome. *See* Open Records Decision No. 552 (1990). Furthermore, when requested information is deemed confidential by law, the presumption of openness may be overcome. *See* Open Records Decision No. 150 (1977).

The department asserts that information the department obtained from the Facility and from European International Reinsurance Company ("Swiss Re"), a subsidiary of Swiss Reinsurance Company, are deemed confidential by law. Section 10 of article 21.49-1 of the Insurance Code reads as follows:

All information, documents, and copies thereof obtained by or disclosed to the commissioner or any other person in the course of an examination or investigation made pursuant to Section 9 and all information reported pursuant to Section 3, shall be given confidential treatment and shall not be subject to subpoena and shall not be made public by the commissioner or any other person, except to [certain parties], without the written consent of the insurer to which it pertains unless the commissioner, after giving the insurer and its affiliates who would be affected thereby notice and opportunity to be heard, determines that the interest of policyholders or the public will be served by publication thereof, in which event he may publish all or any part thereof in such manner as he may deem appropriate.

The department states that it obtained information from the Facility and Swiss Re pursuant to section 9 of article 21.49-1 in the course of approving the acquisition of the Facility. *See* Ins. Code art. 21.49-1, §§ 5, 9. Section 9 of article 21.49-1 states in part as follows:

Subject to the limitation contained in this section and in addition to the powers which the commissioner has under other articles of this code relating to the examination of insurers, the commissioner shall also have the power to order any insurer registered under section 3 to produce such records, books, or other information papers in the possession of the insurer, its holding company, its subsidiaries, or its affiliates as shall be necessary to ascertain the financial condition or legality of conduct of such insurer.

Based on your representation that the department obtained the information from the Facility and Swiss Re pursuant to section 9, we conclude that the information so obtained is made confidential by section 10 of article 21.49-1 of the Insurance Code. We believe section 10 also applies when the information obtained pursuant to section 9 appears in correspondence and other memoranda. The applicability of this confidentiality statute is a compelling reason to overcome the presumption that the information is public. *See* Open Records Decision No. 150 (1977). The department must withhold such information from required public disclosure based on section 552.101 of the Government Code.¹

As for Government Code sections 552.106, 552.111 and 552.112, we conclude that the department has waived these exceptions. *See* Open Records Decision No. 552 (1990). Thus, to the extent the information does not contain information made confidential by section 10 of article 21.49-1 of the Insurance Code, the department must release the information.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Hastings
Assistant Attorney General
Open Records Division

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¹In light of our conclusion under section 552.101 in conjunction with Insurance Code article 21.49-1, we need not address the applicability of Insurance Code article 1.15, section 9 and Government Code section 552.112 to the information the department states it obtained from the Facility and Swiss Re pursuant to section 9 of article 21.49-1 of the Insurance Code.

Ref.: ID# 113701

Enclosures: Submitted documents

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